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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 675

RICHARD WILLIAM MARSHALL,
Appellant,

vs.

STATE OF LOUISIANA

APPEAL FROM THE DISTRICT COURT, FIRST JUDICIAL DISTRICT, PARISH OF CADDO, STATE OF LOUISIANA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

EDWIN L. BLEWER,
FRED S. LEBLANC,
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Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 675

RICHARD WILLIAM MARSHALL,
Appellant,

vs.

STATE OF LOUISIANA,
Appellee

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

The appellee, believing that the matters set forth below will demonstrate the lack of substance in the questions raised by this appeal, file this, its statement in opposition to appellant's statement as to jurisdiction.

Appellee includes herein its motion to dismiss the appeal or, in the alternative, to affirm the judgment of the First Judicial District Court, Caddo Parish, Louisiana, on the ground that the questions raised on behalf of the appellant are so unsubstantial as not to need further argument.

The unsubstantial character of the grounds stated by appellant is so apparent on the face of the record as to warrant the Court in summarily disposing of the appeal at

this stage of the proceeding. Appellee shows that plaintiff-appellant's pleadings are unsubstantial in that:

1

They fail to set up any unconstitutionality or lack of due process of law in violation of the Fourteenth Amendment of the United States Constitution.

2

The alleged unconstitutionality of the statute is based on an attack on certain words abstracted from the text of the statute, which words by themselves are attacked as being too vague and indefinite to support a criminal charge, whereas, the statute as a whole defines the crime with sufficient particularity.

Act 43 of 1942 of the Louisiana Legislature (Louisiana Criminal Code), Article 107, Section 7, reads:

> "The following persons are and shall be guilty of Vagrancy:
> • • •
> "(7) Persons who are found IN OR NEAR ANY STRUCTURE, movable, vessel, or PRIVATE GROUNDS, without being able to account for their presence therein." (Capitalization ours.)

3

The attack on the constitutionality is made as to the vagueness of the words "near" and "structure," whereas the statute specifies the phrase "in or near" and the phrase "structure • • • or private grounds."

4

The statute does provide a readily ascertainable standard of guilt, for the following reasons:

(a) The laws of the State of Louisiana provide that where a statute is written in the disjunctive, such as: "Per-

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sons who are found in or near any structure, etc.," it may be charged in the conjunctive, such as: "in and near." Article 222, Louisiana Code of Criminal Procedure, provides:

> "Several distinct offenses, or the intent necessary to constitute such offenses, disjunctively enumerated in the same law or in the same section of a criminal statute, may be cumulated in the same count, when it appears that they are connected with the same transaction and constitute but one act, but in that event they must be charged conjunctively."

(b) This accused is charged with being in and near the building, the charge being as follows:

> "• • • on or about the 23rd day of September in the year of our Lord, one thousand nine hundred and forty-seven at and in the said Parish, District and State aforesaid was found in and near a structure and building and private premises, to-wit: the office of Hunt Oil Company located in the City Bank Building at the corner of Milam and Market Streets, Shreveport, Louisiana, without being able to account for his presence therein."

Proof need be made only that the accused was in the building, and all of the proof in this case was to that effect. See transcript of evidence attached to the record, at pages 52 through 57.

> "Where the statute makes it an offense to break 'or enter' the indictment may charge that the accused did break 'and' enter; but the state is not obliged to prove that accused both broke and entered."
>
> *State* v. *Burns*, 131 La. 396, 59 So. 823;
> *State* v. *Selsor*, 140 La. 468, 73 So. 270.

(c) Such a charge leaves no basis for ambiguity or lack of understanding by any defendant as to the fact that being in a building is prohibited by the statute.

> "A statute prohibiting the possession of whiskey 'at or near' the premises wherein wine and beer are legally sold is not void, since even if the word 'near' is too indefinite, it may be eliminated, leaving the word 'at' which will sustain an indictment for possession of whiskey 'on' the premises."
>
> *Moore* v. *State* (1937), 132 Tex. Crim. Rep. 330, 112 S. W. (2d) 194, 83 L. Ed. 899.

This case is cited and approved in:

> *ex parte Frye,* Court of Criminal Appeals of Texas (Dec. 10, 1941), 156 S. W. (2d) 531, at page 537:
>
> "Relator also contends that the words 'at or near any place where a labor dispute exists' are too uncertain and indefinite to apprise him of what is meant by the word 'near', inasmuch as no rule is stated by which the distance may be ascertained so as to avoid offending against the statute. This may be true, but nevertheless the statute may be upheld since the word 'near' is not fatal to the other provisions thereof * * *. We do not wish to be understood as holding that the word 'near,' which is a relative term, is so indefinite as to invalidate the statute. The term 'near' is defined by Webster 'Within a little distance from; close or upon.' "

(d) A "structure" is a well known term, readily understandable to the layman and definite in its meaning. Webster's dictionary defines "structure" as:

> "A building of any kind."

(e) The word "structure" is made even more definite in the charge as being "a building and private premises," with the description thereof by office, building, street corner, and city. There can be no question that a Building is

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known to everyone to be a Structure. The United States Supreme Court and other courts have upheld the use of words with much less definite and universal meaning, such as the following words and phrases:

"Range"—*Omaechevarria* v. *Idaho*, 246 U. S. 343, 62 L. Ed. 763;

"Number of employees needed"—*United States* v. *Petrillo*, 91 L. Ed. 1403 (Advance Sheet No. 17);

"Visible income," "Idlers," "Gamblers," and "Consort," in *Morgan* v. *Commonwealth of Virginia* (1937), 191 S. E. 791, 111 A. L. R. 62;

"Kosher"—*Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497, 69 L. Ed. 402, 45 S. Ct. 141;

none of which were specifically defined in the statute creating the crime.

5

That the statute under which the charge is made is a part of the Louisiana Criminal Code, which code is Act 43 of 1942, and which Act provides in Section 5 thereof:

> "Should any section, subsection, article, clause, sentence, phrase, part or application of this act, for any reason be found unconstitutional or invalid, other parts or application thereof shall not thereby be affected."

6

Accordingly, the words "and near" in the charge and the words "or near" in the statute being completely inapplicable to the facts of this case, can be disregarded by this Court, without affecting the constitutionality of the remainder of the statute under attack. If, for the purpose of argument only, it be considered that the word "near" was too vague to inform a defendant of the crime charged, and even if the Court should hold the use of the word "near"

to be unconstitutional, it would be the duty of the Court to uphold the statute as to the word "in."

Berea College v. *Kentucky*, 211 U. S. 45, 53 L. Ed. 81, 85;
Keller v. *Potomac Electric Power Co.*, 261 U. S. 428, 67 L. Ed. 731, 43 S. Ct. 445;
Utah Power & Light Co. v. *Pfost*, 286 U. S. 165, 76 L. Ed. 1038;
Dorchy v. *Kansas*, 264 U. S. 286, 290, 68 L. Ed. 686, 689, 44 S. Ct. 323.

7

The contentions of the appellant as to:

(a) denying to the defendant the presumption of innocence,

(b) placing upon him the burden of proving his innocence,

and (c) denying to him his right against self incrimination,

are lacking in substantiality because the questions sought to be raised thereby are controlled and foreclosed by the settled doctrine of the United States Supreme Court as established in the case of:

Adams v. *New York* (1904), 192 U. S. 585, 48 L. Ed. 575, in which the Court stated with reference to possession of policy slips:

"• • • Innocent persons would have no trouble in explaining the purpose of these tickets, and in any event the possession is only prima facie evidence, and the party is permitted to produce such testimony as will show the truth concerning the possession of the slips. Furthermore, it is within the established power of the state to prescribe the evidence which is to be received in the courts of its own government. Fong Yue Ting *v.* United States, 149 U. S. 698-729, L. Ed. 905-918, 13 Sup. Ct. Rep. 1016,"

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thus showing that it is not unconstitutional for a statute to contemplate or even require some sort of account or explanation by a defendant.

8

There are many rights and privileges afforded the accused in a criminal case by the jurisprudence of a particular State which, nevertheless, are not guaranteed by the United States Constitution with reference to State actions, and under such circumstances the due process clause of the United States Constitution is not applicable.

Among these are:

(a) Shifting the burden of proof from the prosecution to the defense as to particular matters.

(b) The privilege against self incrimination.

(c) The right to be confronted by witnesses at the actual trial where depositions have been taken at a preliminary hearing.

But these rights flowing from State citizenship, not being guaranteed by the United States Constitution, are governed by State law, and the Supreme Court of the United States is bound by the decisions of the various State courts thereon. For example, in:

West v. *Louisiana,* 194 U. S. 258, 48 L. Ed. 965, the Court, after reviewing prior jurisprudence, concluded that the right to be confronted by witnesses was not guaranteed by the United States Constitution.

To the same effect is:

Twining v. *New Jersey,* 211 U. S. 278, 53 L. Ed. 97-112, which specifically held that the privilege against self incrimination was not an element of due process under the Federal constitution and was not protected by the Fourteenth Amendment.

See also:

Adamson v. *California,* 91 L. Ed. 1464 (Advance Sheet No. 17 at page 1469), which reaffirmed the conclusion of the *Twining* case:

> "that protection against self incrimination is not a privilege or immunity of national citizenship."

and: *People of New York* v. *Defore,* 242 N. Y. 13, 150 N. E. 585. Cert. den. 270 U. S. 657, 70 L. Ed. 784.

There are even rights of an accused which Federal prosecutions must recognize and enforce but, being privileges of national citizenship, they do not have to be so recognized and enforced in State prosecutions, such as:

The right of being offered legal counsel by the court. See: *Foster* v. *Illinois,* 91 L. Ed. 1542 (Advance Sheet No. 17),

and *Gayes* v. *New York,* 91 L. Ed. 1549 (Advance Sheet No. 17).

Each State controls rules of evidence in criminal trials. Shifting the burden of proof from the prosecution to the defendant has been upheld as to particular facts and circumstances which the defendant must explain to the court or to the jury, either because:

(a) Of a prima facie presumption or other presumption set forth in the statute;

(b) or resulting from the language of the statute;

(c) or even resulting from the facts developed at the trial.

See: *Luria* v. *United States,* 231 U. S. 9, 58 L. Ed. 101, in which a defendant was compelled to explain, in a naturalization case, his taking up residence in a foreign country within five years after issuance of a certificate of citizenship; and

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Yee Hem v. *United States*, 268 U. S. 178, 69 L. Ed. 904, in which the court held that:

> "• • • the presumption of innocence with which an accused enters upon his trial may be overcome, in many cases, when the facts developed by the prosecution standing alone are not enough, by the additional weight of a countervailing legislative presumption,"

the Court going on to say:

> "If the effect of the legislative act is to give to the facts from which the presumption is drawn an artificial value to some extent, it is no more than happens in respect of a great variety of presumptions not resting upon statute. See Dunlop *v.* United States, 165 U. S. 486, 502, 503, 41 L. Ed. 799, 804, 805, 17 Sup. Ct. Rep. 375; *Wilson* v. *United States*, 162 U. S. 613, 619, 40 L. Ed. 1090, 1094, 16 Sup. Ct. Rep. 895."

Both of the above cases were affirmed and approved in *Casey* v. *United States*, 276 U. S. 413, 72 L. Ed. 632:

> "Furthermore, there are presumptions that are not evidence in a proper sense, but simply regulations of the burden of proof. • • • The statute here talks of prima facie evidence but it means only that the burden shall be upon the party found in possession to explain and justify it when accused of the crime that the statute creates.
>
> "It is consistent with all the constitutional protections of accused men to throw on them the burden of proving facts peculiarly within their knowledge and hidden from discovery by the government. 4 Wigmore, Ev., sec. 2486."

See also:

Lindsley v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 55 L. Ed. 369,

in which various rulings of the state appellate court were to the effect that a presumption arose from the proof

of certain facts, a presumption apart from the statute; and the United States Supreme Court held:

> "* * * it establishes a rebuttable presumption, but neither prevents the presentation of other evidence to overcome it nor cuts off the right to make a full defense.
>
> "Each state possesses the general power to prescribe the evidence which shall be received and the effect which shall be given to it in her own courts, and may exert this power by providing that proof of a particular fact, or of several taken collectively, shall be prima facie evidence of another fact,"

citing: *Mobile, J. & K. C. R. Co.* v. *Turnipseed,* 219 U. S. 35, 43, 55 L. Ed. 78, 31 Sup. Ct. Rep. 136, to the effect, pertaining to presumptions and burden of proof, that:

> "Statutes, national and state, dealing with such methods of proof in both civil and criminal cases, abound, and the decisions upholding them are numerous. * * * If a legislative provision not unreasonable in itself, prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him."

9

Applying the decisions of the above cases to the facts of this case, it is readily apparent that while the statute does not itself create any presumption or *prima facie* case, neither does it require the defendant to incriminate himself. The only possible effect that could result from the wording of the statute would be that, once the State proved that the defendant was found in a structure or private grounds, the burden would then shift to the defendant to

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account for his presence therein. The choice is left with the defendant:

> (a) If he is in the structure for no evil purpose then the explanation of his presence lies peculiarly within his own knowledge, and his explanation will not incriminate him.
>
> (b) If his presence in the building is for an unauthorized purpose, then he need not give an explanation at all but can go to trial under the usual rules of procedure; does not have to take the witness stand unless he sees fit; and leaves it to the state to prove its case by the usual rules of evidence and beyond a reasonable doubt.

A very pertinent illustration of this freedom of choice on the part of the defendant is found in:

Reynolds v. *United States*, 98 U. S. 145, 25 L. Ed. 244, in which the state had proved the absence of a material witness and had shown that the whereabouts of the witness was very likely within the knowledge of the defendant. The Court, in holding that the burden of proof shifted to the defendant and that he had the opportunity of either explaining or not explaining, said:

> "Clearly, enough had been proven to shift the burden upon him of showing that he had not been instrumental in counselling or keeping the witness away. Having the means of making the necessary explanation and having every inducement to do so if he would, the presumption is that he considered it better to rely upon the weakness of the case made against him than to attempt to develop the strength of his own."

The contention of appellant that the statute under which the charge was filed is unconstitutional because of vagueness is lacking in substantiality not only for the reasons

set forth above, but also because the questions attempted to be raised are controlled and foreclosed by the doctrine of the United States Supreme Court as established in:

United States v. *Petrillo,* 91 L. Ed. 1403 (Advance Sheet No. 17),

in which the Court in discussing the phrase:

"Number of employees needed,"

said:

> "The argument really seems to be that it is impossible for a jury or court ever to determine how many employees a business needs, and that, therefore, no statutory language could meet the problem Congress had in mind. * * * The Constitution presents no such insuperable obstacles to legislation. * * * That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. Robinson *v.* United States, 324 U. S. 282, 89 L. Ed. 944, 65 Sup. Ct. Rep. 666. * * * THE LANGUAGE HERE CHALLENGED CONVEYS SUFFICIENTLY DEFINITE WARNING AS TO THE PROSCRIBED CONDUCT WHEN MEASURED BY COMMON UNDERSTANDING AND PRACTICES. THE CONSTITUTION REQUIRES NO MORE." (Capitalization ours.)

In *United States* v. *Ragen,* 314 U. S. 513, 86 L. Ed. 383,

the Court states:

> "We have concluded, however, that the ground of decision below is untenable. The mere fact that a penal statute is so framed as to require a jury upon occasion to determine a question of reasonableness is not sufficient to make it too vague to afford a practical guide to permissible conduct."

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The Court in that case was passing upon an income tax determination of allowable deductions, by reference to a standard of "reasonableness."

In *Omaechevarria* v. *Idaho*, 246 U. S. 343, 62 L. Ed. 763,

in which a state law prohibited:

> "Any person having charge of sheep from allowing them to graze on a range previously occupied by cattle,"

and the uncertainty asserted was failure of the statute to define the boundaries of a range or the length of time necessary to constitute a prior occupation by cattle, the Court said:

> "Men familiar with range conditions and desirous of observing the law will have little difficulty in determining what is prohibited by it. Similar explanations are common in criminal statutes of other states. This statute places no greater uncertainty or difficulty in application to necessarily varying facts, than has been repeatedly sanctioned by this court."

In line with the reasoning in the above cases, this Court will readily recognize that the above decisions are particularly applicable to statutes on vagrancy, vagabondage, and the like, in that the above statutes are:

> "regulatory measures to PREVENT crime rather than as ordinary criminal laws which prohibit and punish certain acts as crimes."
>
> 55 Am. Jur., Vagrancy, Sec. 2, page 466.

> "and such legislation is within the legitimate scope of the police power of the state, and generally has been upheld as against various specific constitutional objections."
>
> 55 Am Jur., Vagrancy, Sec. 3, page 446, citing: *State* v. *McCormick*, 142 La. 580, 77 So. 288, L. R. A. 1918C, 262.

"• • • For the most part vagrancy laws have been sustained against attacks upon their validity upon the grounds of vagueness, indefiniteness, and uncertainty."

55 Am. Jur., Vagrancy, Sec. 4, page 446, citing: 111 A. L. R. 69 *et seq.* 83 L. Ed. 908.

The facts of the instant case and the statute under which a prosecution was had clearly show that this statute was for the purposes hereinabove suggested of preventing crime.

The statute was originally a Vagabondage Statute, which read as follows:

"There shall be but one grade of the offense of vagabondage: Whoever shall have in his possession any picklock, or other tool or instrument which from its nature is intended or fit to be used as a means of effecting a forcible entry into any house, vessel, or railroad car, and unable to show that such possession is for a lawful purpose, or who shall be found in any house, vessel, railroad car, yard or garden and unable satisfactorily to account for his presence in such place, shall be reputed a vagabond, and, as such, imprisoned not exceeding three months, nor less than ten days."

When the new Criminal Code of Louisiana was passed by the Legislature in 1942, the vagabondage statute was repealed but the purpose of it was carried forward and was placed under vagrancy, with which it is clearly allied. Vagrancy laws are ordinarily aimed at persons who are idlers, gamblers, prostitutes and tramps, whose habits and customs make them a recognized class needing regulation to prevent the commission of more serious crimes. This type of person is constantly under surveillance by law enforcement officers because of their habits. Usually when they are convicted of vagrancy it is to keep them out of trouble.

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Vagabondage likewise was a preventive law directed toward:

> Whoever "shall be found in any house, vessel, railroad car, yard or garden and unable satisfactorily to account for his presence in such place,"

Both types of groups are a menace to society, varying but slightly in that the vagrant's course of conduct is usually habitual, whereas vagabonds are ordinarily found in specific acts of trespass or under suspicious circumstances falling short of an attempted crime of more serious nature. That is the reason why the legislature has placed the present law of Louisiana relating to vagabondage in the vagrancy statute, and also accounts for the reason why no course of conduct or habitualness is set forth under Louisiana Criminal Code Article 107, Section 7.

The very purpose of the statute was to prevent prowling such as occurred in this case, such prowling being a type of conduct which the legislature recognizes as fostering and leading to more serious crimes.

The above statute has formerly been passed on in

> *State of Louisiana* v. *Crow Jackson,* No. 32408 on the docket of the Louisiana Supreme Court,

in which writs were refused on May 29, 1933; and

> *as shown by the per curiam of Judge J. U. Galloway,* of the First Judicial District Court, Caddo Parish, Louisiana,

from which jurisdiction this appeal is being taken:

> "The trial court in the Jackson case considered and overruled a motion to quash a plea of unconstitutionality based *on the same grounds as the motion in the instant case.*"

Under analagous circumstances a vagrancy ordinance of the City of New Orleans was sustained by the Louisiana Supreme Court in:

City of New Orleans v. *Postek et al.*, 180 La. 1048, 158 So. 553,

the holding in both of these cases being reaffirmed by the Louisiana Supreme Court by the refusal of writs in the present case on January 14, 1948, being case No. 38852 on the docket of the Louisiana Supreme Court.

It is well settled that in passing on a constitutional question the court is limited to the state of facts in the particular case before it. The state of facts in this case has to do with a prowler:

(a) Who was found on the eleventh floor of an office building;

(b) In the offices of the Hunt Oil Company, which offices had been closed at the usual closing hour, when all of the employees had gone home;

(c) At 11:30 o'clock at night, in an office in which he had not turned on the lights;

(d) Bending over some papers on a desk, where he was apprehended by police officers who had been alerted for some time, investigating reported prowlers of that building;

(e) The presence of the prowler being unknown to the occupants of these offices;

(f) The act on its face being suspicious, unjustifiable, and as yet unexplained since the defendant chose not to explain his presence and since the defendant

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did not take the stand in his defense on the trial of the case.

In the case of:

Morgan v. Commonwealth of Virginia (1937), 191 SE 791, 111 A. L. R. 62,

this proposition is adequately summarized:

"It must be conceded that the General Assembly has the power to enact vagrancy statutes under its police power.

"One challenging a statute must clearly show that in its operation it is unconstitutional AS TO HIM IN HIS SITUATION. The fact that IT MAY BE UNCONSTITUTIONAL AS TO OTHERS in varying circumstances, and asserting its invalidity WHEN APPLIED TO FAR FETCHED IMAGINARY CASES is *not* sufficient." (Capitalization and italics ours.)

See also:

Utah Power & Light Co. v. *Pfost,* 286 U. S. 175, 73 L. Ed. 1048, 1049;

Ohio Tax Cases, 232 U. S. 576, 58 L. Ed. 738, 34 Sup. Ct. Rep. 372;

Vandini Petroleum Co. v. *Superior Court,* 248 U. S. 8, 76 L. Ed. 123, 52 Sup. Ct. Rep. 103, 78 A. L. R. 826, 834.

Wherefore, appellee respectfully submits this statement showing that the questions upon which the decision of this cause depend are so unsubstantial as not to need further argument, and appellee respectfully moves the Court to dismiss this appeal at the costs of the appellant or, in the alternative, to affirm the decision of Honorable James U. Galloway, Judge of the First Judicial District Court, Caddo Parish, Louisiana, finding the accused guilty as charged;

together with the sentence imposed under the said conviction.

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